feel morally certain.[11] The hearsay exception enumerated in the foregoing paragraphs have been called upon to justify the reception of such records, but unfortunately the expansion so attempted has not always been in accordance with any settled scheme of development. However, if we accept the theory that entries in the course of business are admitted on account of the impossibility of producing the witness, it would seem reasonable to extend the application of the rule to cases where the impossibility depends on the large number and shifting characters of the employees of a great industry.[12] This development of the rule is shown in the recent case of *State* v. *Virgens* (Minn. 1915) 151 N. W. 190, where in a trial for murder, the card indexes of a large mail order house, identified by the department manager, were admitted to show the sale of a revolver, on the ground that it would be impossible, or at least highly impractical and undesirable, to identify and call the clerks keeping the records. Since the entrant, if available, can testify from the record as supplementing his memory,[13] a rule allowing the entry itself where the entrant cannot be produced provides sufficient opening for the admission of business records. It must be noted that the requirement of personal knowledge on the part of the entrant,[14] first relaxed in cases where the entries are made by a bookkeeper from regular memoranda of clerks who take the stand,[15] has been apparently lost sight of in some of the later cases, where the clerks are not accounted for.[16] This holding should at least be limited to the cases where the production of the clerk is rendered impossible, whether by death or the complexities of business.

ELEMENTS OF IRREPARABLE INJURY TO LAND.—Although formerly courts of equity were slow to issue writs of injunction except in cases of waste, it is now well settled that this relief will be granted where irreparable injury to the complainant's land is threatened.[1] But there

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[11]Swedish-American Nat. Bank *v.* Chicago, B. & Q. Ry. (1905) 96 Minn. 436; Caton, C. J., in Waggeman *v.* Peters, *supra*, says: "There has been a growing disposition to open the door wider and wider, for books of account as evidence, till now it seems to be thrown down altogether, and the original consideration of necessity, which first introduced them, is altogether lost sight of." See Morrow *v.* Missouri Pacific Ry. (1909) 140 Mo. App. 200.

[12]Northern Pacific Ry. *v.* Keyes (C. C. 1898) 91 Fed. 47; Continental Nat. Bank *v.* First Nat. Bank (1902) 108 Tenn. 374; Seaboard Air Line Ry. *v.* R. R. Commissioners (1910) 86 S. C. 91; see Townsend *v.* Pepperell (1868) 99 Mass. 40.

[13]15 Columbia Law Rev. 468; Gardner *v.* Springfield etc. Co. (1911) 154 Mo. App. 666.

[14]Dykman *v.* Northbridge (N. Y. 1894) 80 Hun 258; Connecticut etc. Ins. Co. *v.* Schwenk (1876) 94 U. S. 593; Schnellbacher *v.* McLaughlin Plumbing Co. (1903) 108 Ill. App. 486.

[15]Mayor *v.* Second Ave. R. R. (1886) 102 N. Y. 572; Miller *v.* Shay (1887) 145 Mass. 162.

[16]Fielder *v.* Collier, *supra*; United States *v.* Cross (1892) 20 D. C. 365; see Hoover *v.* Gehr (1869) 62 Pa. 136.

[1]An injunction was first allowed in the case of trespass on the grounds that the threatened injury was irreparable in Flamang's Case which was followed in Mitchel *v.* Dors (1801) 6 Ves. Jr. *147, and referred to in Hanson *v.* Gardiner (1802) 7 Ves. Jr. *305, *308.

is a wide diversity of views and some conflict of authority as to what constitutes irreparable injury, due to the application of different principles in determining it. One widely accepted test declares that damage is irreparable when it cannot be measured by any pecuniary standard, or when if measured, there can be no adequate compensation because of the nature of the injury.[2] For instance, a trespasser was enjoined from boring oil wells and pumping out the oil because the estimate that could be made of the loss would be based upon pure conjecture;[3] and in another case an injunction was ordered against the removal of bodies from a cemetery because the injury to the outraged feelings of friends and relatives could not be justly compensated, although the technical damage to the cemetery might be measured.[4] It is to be noted, however, that the courts are solicitous that the complainant receive compensation in fact, and therefore, even though the injury can be measured and adequately compensated, the injunction will nevertheless be granted if the defendant is insolvent.[5] It was the application of this measure of damage rule which led Chancellor Kent to decide, in an important New York Case,[6] that injury to barren, rocky land was not irreparable, a decision which has had wide influence.[7]

Other courts have felt that such a test is too narrow; and they avoid its consequences by considering land of such peculiar value, that any injury to it is irreparable.[8] This is particularly true where the trespass might ripen into an easement.[9] This view, moreover, is justified by the fact that the injury, if not enjoined, will work a destruction to the substance of the estate, which is peculiarly repugnant for historical reasons growing out of the old law of waste.[10] Accordingly, where this view prevails, an injunction will be granted even though the lands

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[2]Indianapolis Natural Gas Co. *v.* Kibbey (1893) 135 Ind. 357; Justices *v.* Griffin etc. Road Co. (1852) 11 Ga. 246; Cole *v.* Manners (1906) 76 Neb. 454. This doctrine had a novel application in the following case, where a baseball player was enjoined from playing with a rival team in violation of his contract. Philadelphia Ball Club *v.* Lajoie (1902) 202 Pa. 210.

[3]Indianapolis Natural Gas Co. *v.* Kibbey, *supra.*

[4]Trustees *v.* Walsh (1870) 57 Ill. 363; Mooney *v.* Cooledge (1875) 30 Ark. 640; see Beatty *v.* Kurtz (1829) 2 Pet. 566, 584.

[5]See Gause *v.* Perkins (1857) 56 N. C. 177; Kerlin *v.* West (1844) 4 N. J. Eq. 449.

[6]Jerome *v.* Ross (N. Y. 1823) 7 Johns. Ch. 315.

[7]Crescent Mining Co. *v.* Silver King Mining Co. (1898) 17 Utah 444; Thorn *v.* Sweeney (1877) 12 Nev. 251.

[8]5 Pomeroy, Eq. Jur., § 495.

[9]Poirier *v.* Fetter (1878) 20 Kan. 47; Amsterdam Knitting Co. *v.* Dean (1900) 162 N. Y. 278. And the disturbance of an easement is held to constitute irreparable injury. Barnett *v.* Johnson (1856) 15 N. J. Eq. 481; Espenscheid *v.* Bauer (1908) 235 Ill. 172.

[10]The granting of an injunction was formerly confined to cases of waste, 1 High, Injunctions (4th ed.) § 697, which might consist in a mere change in the character of the property, even though such change produced an actual enhancement in value, because the identification by succeeding owners might thereby be endangered. 1 Reeves, Real Property, § 552. By analogy the same rule was applied in the following cases of trespass. Richards *v.* Dower (1883) 64 Cal. 62; Hext *v.* Gill (1872)

are valueless.[11] Furthermore, it may well be argued that to refuse to enjoin trespass and thus compel the owner to seek damages at law, is to deprive him of his property without due process of law.

The most satisfactory test of irreparable injury, however, may be derived from a consideration of the wrong which is sought to be enjoined. Every owner of property has an absolute dominion over it, which gives him the right to say what shall be done with it, and who may and who may not go upon it. It is the destruction of this right, termed the right of veto,[12] which constitutes the irreparable injury, even though the land itself be practically worthless.[13] The possession of this right may give land a peculiar value, and it is for this reason that lands are bought for speculation. The courts which have accepted the measure of damage rule, have refused to protect the lands owned by speculators, because they regard his conduct in obtaining this right as unconscientious.[14] But the fact that the speculator has been sagacious enough to purchase lands needed by others, is no valid reason for refusing to protect an inherent property right. There need be no fear that the free exercise of this right will conflict with public policy, for when public interest warrants the taking of the land, it may be accomplished by condemnation proceedings.

If this principle had been applied in the recent case of *Lamphear* v. *Subers* (N. J. 1915) 93 Atl. 194, a different result might have been reached. In this case the court refused to enjoin the removal of sand from a river bed because it considered that the injury was not irreparable, since the quantity and value of the sand could be ascertained; nor did the injury, so the court reasoned, constitute a destruction of the estate, because the sand of a river is an ever shifting element, that which is removed being quickly replaced. But if the right of veto theory had controlled, the injury would have warranted equitable interference, for the owner had a right to forbid the trespasser from taking the sand and a right to refuse to sell it.

COMMUNICATIONS BETWEEN JUDGE AND JURY AS A GROUND FOR NEW TRIAL.—When a jury, after retiring to the jury room, desires additional information concerning the testimony in the case or further instructions in law, the proper course of procedure, as laid down by the common law, is for the jury to return to open court and there state its questions.[1] The majority of courts in this country have held that to adopt any other course, unless with the express consent of

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L. R. 7 Ch. App. 699; Clark *v.* Jeffersonville etc. R. R. (1873) 44 Ind. 248. For the same reason injunctions were granted in the cases of mining, quarrying and cutting of timber, which under the measure of damage rule are considered exceptions. Thomas *v.* Oakley (1811) 18 Ves. Jr. *184; Erhardt *v.* Boaro (1885) 113 U. S. 537; West Point Iron Co. *v.* Reymert (1871) 45 N. Y. 703.

[11]Richards *v.* Dower, *supra.*

[12]Goodson *v.* Richardson (1874) L. R. 9 Ch. App. 221, 224.

[13]See Richards *v.* Dower, *supra*; Oliphant *v.* Richman (1904) 67 N. J. Eq. 280; Commonwealth *v.* Pittsburgh etc. R. R. (1854) 24 Pa. 159; Haskell *v.* Sutton (1903) 53 W. Va. 206; Lamprey *v.* Danz (1902) 86 Minn. 317.

[14]Bassett *v.* Salisbury Mfg. Co. (1867) 47 N. H. 426; Edwards *v.* Allouez Mining Co. (1878) 38 Mich. 46.

[1]Burrows *v.* Unwin (1828) 3 C. & P. 310.